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## THE USE THAT THE FUTURE MAKES OF THE PAST: JOHN MARSHALL'S GREATNESS AND ITS LESSONS FOR TODAY'S SUPREME COURT JUSTICES

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John Marshall's greatness rests on a relatively small number of Supreme Court opinions, of which the most famous are *Marbury v. Madison*,<sup>1</sup> *McCulloch v. Maryland*,<sup>2</sup> and *Gibbons v. Ogden*.<sup>3</sup> Beyond these are a number of less famous but also important cases, including his opinions in the Native American cases,<sup>4</sup> *Fletcher v. Peck*,<sup>5</sup> and *Dartmouth College v. Woodward*.<sup>6</sup>

What makes Marshall a great Justice? One feature is certainly his institutional role in making the U.S. Supreme Court much more important to American politics than it had been previously. That is a function, however, of the sorts of cases that were brought before the Court, and of the opinions he chose to write. Marshall was also important as an early intellectual leader of the Court, as opposed

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1. 5 U.S. (1 Cranch) 137 (1803).

2. 17 U.S. (4 Wheat.) 316 (1819).

3. 22 U.S. (9 Wheat.) 1 (1824).

4. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

5. 10 U.S. (6 Cranch) 87 (1810).

6. 17 U.S. (4 Wheat.) 518 (1819). Michael Klarman has argued that Marshall gets more credit for these opinions than he deserves, and that "the prevalent assumption that they fundamentally shaped the course of American national development is almost certainly wrong." Michael Klarman, *How Great Were the Great Marshall Court Decisions?*, 87 VA. L. REV. 1111 (2001).

to being merely its Chief Justice. That, too, is a function of the opinions he wrote.

#### FIRST IMPRESSIONS COUNT

Thus, Marshall's greatness tends to revolve around his opinions. What exactly did those opinions do? They often involved the initial construction of a piece of constitutional text. The initial gloss on a portion of the Constitution offers a judge the opportunity for the creation of new doctrinal categories that will prove lasting. That is clearly the case with Marshall. Many doctrines or catch phrases, including "political question," "domestic dependent nations," and the doctrine of implied powers, either begin with or are made famous by Marshall. It is important to note, however, that almost any initial gloss on a piece of constitutional text is likely to have a disproportionate influence on the later development of interpretations of that piece of text. That is because subsequent interpretations normally rely on the initial interpretation. Even if they disagree with or distinguish it, they must take the initial gloss into account. Interpretative traditions are path-dependent, and the later direction of the path often depends heavily on the initial first steps.

In particular, the initial gloss on a piece of constitutional text can either cause the text to become a wellspring of further interpretations, or, as in the case of Justice Miller's initial reading of the Privileges or Immunities Clause of the Fourteenth Amendment,<sup>7</sup> it can essentially make the constitutional text irrelevant and thus forestall virtually all litigation concerning it. All other things being equal, the first approach is likely to be the more influential and honored in the long run. That is because lawyers will tend to focus on those parts of the Constitution about which they can litigate. All things being equal, Justices tend to be more highly regarded if lawyers spend a lot of time thinking and arguing about their opinions. Thus, the opinions of a Justice who makes a portion of the Constitution litigable will inevitably draw more attention than the opinions of a Justice who makes a portion of the Constitution effectively a dead letter. I suspect that Justice Miller's

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7. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873).

importance stems largely from the fact that he was the first to interpret the Fourteenth Amendment, but that he would have been much more important and much more famous if he had not squashed the life out of the Privileges or Immunities Clause and, instead, had created a gloss that future lawyers could fight over.

#### PICKING THE RIGHT TOPICS

This brings me to a second feature of Marshall's opinions. Marshall wrote on subjects that were of immense importance to the America of his day: contractual liberties, the rights of settlers versus Native Americans, and the powers of the national government vis-à-vis the states. And, of course, *Marbury v. Madison* is a case about the struggle between the two major political parties of Marshall's day—the Federalists and the Republicans—as well as a case about the relative powers of the judiciary vis-à-vis the Congress. All other things being equal, a Justice who hurls the Court into major political controversies is more likely to be regarded as controversial, and hence, almost by definition, more talked about and discussed.

Marshall's choices in this respect were impeccable if his goals were to have great influence in his own day and lasting influence in the future. It is important to recognize that in the 1800s the Supreme Court's docket was not essentially discretionary as it is today. Hence, Marshall could not pick and choose his topics; rather, he had to take advantage of whatever opportunities were presented by the cases that came to the Court. Marshall did not squander his opportunities. His initial glosses on most of the constitutional texts he construed were not like Justice Miller's in that they cut off future development. *Marbury v. Madison*, which confirmed the power of judicial review, opened a wide swath of possibilities for future constitutional development, as did *McCulloch* and *Gibbons*. All of these opinions raised more questions than they answered.

Of course, there is no guarantee that what is a central topic of concern in 1820 will continue to be an important question two hundred years later. The question of contractual rights raised in cases like *Fletcher v. Peck*, *Dartmouth College v. Woodward*, and

*Sturges v. Crowninshield*,<sup>8</sup> was quite important in Marshall's own day, but the Contracts Clause has largely receded from importance in constitutional law due to significant changes in political and economic aspects of American life. Nevertheless, the more controversial and central the topics that a Justice takes on, the more likely it is that he or she will hit upon something that is lasting. In Marshall's case, he hit the jackpot in *Marbury*, *McCulloch*, and *Gibbons*. Judicial review, the scope of national powers, federalism, and Congress's commerce power have turned out to be perennial topics of concern in American constitutional law. Obviously Marshall's own initial interpretations had something to do with this, but one suspects that even if he had not written his opinions so broadly, these topics would have been rather important in American politics.

A similar phenomenon applies to Justice Story. His opinion in *Prigg v. Pennsylvania*<sup>9</sup> construed the Fugitive Slave Clause, a dead letter today. It was his opinions in cases like *Martin v. Hunter's Lessee*,<sup>10</sup> as well as his commentaries on the Constitution,<sup>11</sup> that helped to establish his reputation. It is important to note that the converse phenomenon is not always true. A Justice who writes an opinion about a topic that was considered relatively unimportant in his or her own day but later becomes quite significant may get some boost in reputation, but not as great as when the topic is a continuing source of concern.

Story's example raises another important factor—longevity. Longevity bolsters a Justice's reputation for any number of reasons. The longer one stays on the Court, the more opportunities for writing on a wide variety of topics, and hence, the greater the chances for garnering the attention of present and future generations. In addition, longevity gives a Justice more of a chance to develop an army of supporters and allies who will praise his or her name (I will say more about the importance of a coterie of admirers in a moment). It is hard to say which Justices were most

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8. 17 U.S. (4 Wheat.) 122 (1819). One might add *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827), which featured Marshall's only dissent in a constitutional case.

9. 41 U.S. (16 Pet.) 536 (1842).

10. 14 U.S. (1 Wheat.) 304 (1816).

11. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833).

hurt by lack of longevity, but a list of likely candidates would include Abe Fortas, Arthur Goldberg, and Wiley Rutledge, all men of considerable intellectual capacity whose careers on the bench were cut short for one reason or another. The Justice who was probably least hurt by lack of longevity is Benjamin Cardozo, but that is largely because Cardozo's reputation as a common law jurist was secured before he was appointed to the Supreme Court of the United States.<sup>12</sup>

#### BEING ON THE "RIGHT SIDE"

This brings me to a third feature of Marshall's opinions: Marshall had the great fortune to be on the "right" side of most of the national disputes that he wrote about, judged from the standpoint of later generations. Put more bluntly, Marshall was the beneficiary of an American politics that, especially in the twentieth century, accepted the centrality of judicial review, sought an expanded role for the national government, and established the importance of national regulatory decision making over local state control. The Civil War and the New Deal both promoted federal supremacy over the states, and the New Deal promoted federal regulatory supremacy. Although judicial review was attacked during the New Deal, Marshall's decisions in *McCulloch* and *Gibbons* could easily be understood as exercises of judicial restraint, not judicial assertion, since they deferred to congressional judgments about the scope of national power. In any case, with the rights revolution and the civil rights movement of the second half of the twentieth century, judicial review became entirely respectable again, and *Marbury* became an honored symbol of the role that courts could play in making America a just society under the rule of law.

All of this is in some sense ironic. Although Marshall did write on behalf of expanded judicial and federal power, the courts and the federal government have much greater power and influence than he would have dreamed of, and he might well have opposed many features of current doctrine.<sup>13</sup> Perhaps more importantly, federal

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12. See RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 128 (1990).

13. See, for example, his dissent in *Ogden v. Saunders*, which anticipates *Lochner v. New York*, 198 U.S. 45 (1905). *Ogden*, 25 U.S. at 332 (Marshall, C.J., dissenting).

power and judicial power were, at least in the twentieth century, often associated with progressive and liberal causes. John Marshall was not a progressive or a liberal. He was a defender of many of the values of the Federalist Party years after that party had ceased to exist. From the standpoint of today's society he would more likely be a friend of the rich and the powerful than of the poor and the powerless.

Nevertheless, Marshall is honored today because he guessed correctly about the direction of the country's growth, and he guessed correctly not merely because of his wisdom but because he proved useful to the people who came after him. He had the right politics in his day for the politics of later generations, and in particular, for the politics of our own day.

By contrast, consider Roger B. Taney, who is one of the most famous of Supreme Court Justices, but had the misfortune to guess wrong on the issue of slavery. Taney was, in his own day, a supporter of Jacksonianism interested in the plight of the average (white) man and opposed to the concentration of economic power in the hands of a favored few. However, he was also a staunch supporter of slavery, and with it, state's rights. He is best remembered today for *Dred Scott v. Sandford*,<sup>14</sup> in which he argued that blacks could not be citizens because, according to the original understanding at the time of the Constitution, they were "beings of an inferior order, . . . altogether unfit to associate with the white race, . . . and having . . . no rights which the white man was bound to respect."<sup>15</sup> This proved not to be a particularly good strategy for being well thought of in the future.

Indeed, if Taney is remembered at all today, it is largely because he brought the Court headlong into the most important political controversy of the day—chattel slavery and its expansion throughout the United States. However, he is not well thought of because he picked the wrong side in that dispute, at least judged from the standpoint of the present. Moreover, in support of that side of the controversy, he wrote the most infamous opinion in the constitutional canon—*Dred Scott v. Sandford*. Indeed,

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14. 60 U.S. (19 How.) 393 (1857).

15. *Id.* at 407.

*Dred Scott*, like Justice Brown's opinion in *Plessy v. Ferguson*,<sup>16</sup> is "anticanonical." Lawyers, judges, and legal scholars repeatedly endeavor to explain why it is wrongly decided.<sup>17</sup> Again, this is not a formula for ensuring greatness in the eyes of later generations.

Because John Marshall was Chief Justice, and because he was the dominant intellectual figure on his court, he was usually able to express his views in majority opinions. Nevertheless, dissenting opinions that are on the right side of the right topics (in the eyes of future generations) can also help establish a Justice's reputation. Justices Holmes and Brandeis made their reputations in part through their dissents. Holmes is famous for his dissents in *Lochner v. New York*,<sup>18</sup> *Abrams v. United States*,<sup>19</sup> and *Gitlow v. New York*.<sup>20</sup> Brandeis, who joined Holmes' dissents in *Abrams* and *Gitlow*, is also famous for his dissents in *New State Ice Company v. Liebmann*<sup>21</sup> and for his concurrence in *Whitney v. California*,<sup>22</sup> which is, in effect, a dissent from the reasoning of the majority. John Marshall Harlan is perhaps most famous for his dissents in *Plessy v. Ferguson* and *The Civil Rights Cases*.<sup>23</sup> His grandson, John Marshall Harlan II, is famous for his dissent in *Poe v. Ullman*,<sup>24</sup> which supported contraceptive rights.

#### WASHING ONE'S SINS AWAY

It should be obvious from Taney's example that being on "the right side" has everything to do with the judgment of later generations and with how the future constructs a Justice's legacy. Without his support of slavery, Taney would probably be remembered quite differently, perhaps as the key judicial proponent of Jacksonian democracy. That would have made him a champion

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16. 163 U.S. 537 (1896).

17. See J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1019 (1998).

18. 198 U.S. 45 (1905).

19. 250 U.S. 616 (1919).

20. 268 U.S. 652 (1925).

21. 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting).

22. 274 U.S. 357 (1927).

23. 109 U.S. 3 (1883).

24. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

of egalitarian values, rather than a defender of inequality. To a very large extent, Justices cannot control how future generations will understand them. Nevertheless, it is helpful if a Justice has a devoted coterie of admirers who will play up the Justice's good works and play down those opinions that seem mistaken or benighted in the light of subsequent history. Put in more contemporary terms, spin control on behalf of a Justice—particularly during his or her lifetime but also in the years immediately after—is particularly important to securing a favorable report for posterity. When a Justice has devoted admirers protecting his or her reputation, the judgments of history may be far milder. Then, to reverse Mark Antony's famous line, the good that these Justices do lives after them, while the evil is interred with their bones. Their judicial sins are washed away.

Perhaps the best example of this phenomenon is Oliver Wendell Holmes, Jr. Holmes had the good fortune to be greatly admired in his own lifetime. He had a devoted circle of adherents—in the legal academy, the practicing bar, and on the bench—who stressed his good works and deemphasized his less savory opinions and decisions.<sup>25</sup> This helped propel his good reputation forward in later years. Even though his status has had its ups and downs, he is still counted by most lawyers and legal scholars as a very great Justice.<sup>26</sup>

Today Holmes is revered for his *Lochner* dissent, and for his dissents with Justice Louis Brandeis in early First Amendment cases like *Abrams* and *Gitlow*. But it is important to remember that he also upheld Eugene V. Debs' conviction for seditious advocacy.<sup>27</sup> This is no small matter. Debs was a prominent American politician—as the candidate of the Socialist Party he received millions of votes in the 1912 and 1920 presidential elections. Sending so famous a dissident to jail was certainly a greater blow

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25. See ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE WORK, AND LEGACY OF JUSTICE HOLMES 181-82 (2000); G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 355-56 (1993).

26. Hence the title of Yosai Rogat's famous critical essay on Holmes. Yosai Rogat, *Mr. Justice Holmes, A Dissenting Opinion*, 15 STAN. L. REV. 3 (1962). Alschuler notes, with evident dismay, that the 1990s produced "an extraordinary wealth of . . . writing about Holmes, nearly all of it laudatory." ALSCHULER, *supra* note 25, at 10.

27. *Debs v. United States*, 249 U.S. 211 (1919).



to civil liberties and freedom of speech than the conviction of the little known defendants in *Abrams* or *Gitlow*.

If Holmes didn't care for substantive due process in *Lochner*, he liked it no better in *Buck v. Bell*,<sup>28</sup> in which he upheld an involuntary sterilization with the callous remark that "[t]hree generations of imbeciles are enough."<sup>29</sup> He also dissented in *Meyer v. Nebraska*,<sup>30</sup> in which the State of Nebraska, in a fit of war hysteria, tried to prevent the teaching of German in public schools—a plan the Court struck down under a theory of substantive due process. *Meyer*, of course, became a key precedent in the line of cases leading up to *Skinner v. Oklahoma*<sup>31</sup> and *Griswold v. Connecticut*.<sup>32</sup> Finally, Holmes, the great civil libertarian, wrote the opinion in *Giles v. Harris*,<sup>33</sup> in which he acquiesced to the wholesale disenfranchisement of blacks in Alabama, blandly remarking that there was nothing the Court could do to stop the most blatant violations of the Fifteenth Amendment.<sup>34</sup> Holmes argued for judicial restraint in all three cases. But doing nothing seems considerably less admirable in *Meyer* and *Giles* than it does in *Lochner*.

Nevertheless, even though there is much that is distasteful in Holmes's judicial record, he is remembered today as the great advocate of judicial restraint in *Lochner* and the great protector of free speech in *Abrams* and *Gitlow*. His sins in cases like *Debs*, *Buck*, *Meyer*, and *Giles* have been washed away. Another important factor that may have helped Holmes is his style, which is pithy, quotable, and fun to read.<sup>35</sup>

The first Justice Harlan is another example of a Justice whose sins have been washed away by later generations. Harlan is best known today for his denunciation of Jim Crow in his dissent in

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28. 274 U.S. 200 (1927).

29. *Id.* at 207.

30. 262 U.S. 390 (1923).

31. 316 U.S. 535 (1942).

32. 381 U.S. 479 (1965).

33. 189 U.S. 475 (1903).

34. *Id.* at 486-88.

35. Similarly, Judge Richard Posner concludes that one of the factors that helped Benjamin Cardozo attain his exalted status is his rhetorical style. POSNER, *supra* note 12, at 126-27.

*Plessy*. Less well known is that this same dissent reflects anti-Asian sentiments. Harlan argues that it is unfair that blacks should be denied the right to sit with whites in railway carriages when this privilege is enjoyed by the Chinese, "a race so different from our own that we do not permit those belonging to it to become citizens of the United States."<sup>36</sup> He also joined Chief Justice Fuller's dissent in *United States v. Wong Kim Ark*,<sup>37</sup> which argued that Chinese born in the United States should not become birthright citizens because they were so alien a race that they could not be assimilated into American culture.<sup>38</sup> Nevertheless, because of his *Plessy* dissent, with its many famous phrases, and his dissent in *The Civil Rights Cases*, Harlan is seen to have been on the right side of the struggle for racial equality in the 1880s and 1890s. For this reason, he is honored today.

When we look more closely at John Marshall, we can see that he too has been the beneficiary of ritual cleansing by later generations. Like Holmes, he was a great stylist, and like Holmes, Marshall was greatly respected in his lifetime. He was beloved by his fellow judges, and particularly by Justice Story, who did much to elevate his reputation.<sup>39</sup> Finally, like Holmes, his more honored opinions have obscured other features of his career. After all, Marshall's record in the Native American cases—particularly *Graham's Lessee v. M'Intosh*—was hardly praiseworthy. And his dissent in *Ogden v. Saunders* anticipates Justice Peckham's opinion in *Lochner*. Because of his opinions in *Marbury*, *McCulloch*, and *Gibbons*, however, these sins have all been washed away. Furthermore, as I have noted, during the New Deal, Marshall became a convenient symbol of constitutional nationalism.

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36. *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting). Harlan also joined the Court's opinion in *Pace v. Alabama*, 106 U.S. 583 (1883), which, a decade prior to *Plessy*, upheld a conviction for miscegenation on the grounds that separation of the races treated blacks and whites equally.

37. 169 U.S. 649 (1898).

38. *Id.* at 725-32 (Fuller, C.J., dissenting). He also joined in the Chinese Exclusion Cases, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) and *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). See generally Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996) (criticizing Harlan's attitudes toward the civil rights of Asians).

39. See, e.g., STORY, *supra* note 11, at iii-iv, *reprinted with introduction by* Ronald D. Rotunda and John E. Nowak (1987) (a book dedicated to John Marshall).

Marshall and Holmes have something else in common. Both are protean. They can be many different things to many different people.<sup>40</sup> Of course this simply restates in another way the point I have been making: Justices' reputations do not belong to them. They belong, instead, to the people who make use of those reputations. Reputations are made and shaped based in part on the constitutional controversies of later periods. People look to past Justices as potential heroes and villains. The more protean a Justice is, the more that people of differing views can hold the Justice up as an exemplar of their favored approach to constitutional interpretation. Both Holmes and Marshall fill this role admirably, and that is one reason why their reputations have endured.

#### SHOULD JUSTICES TRY TO BE GREAT?

To sum up, Marshall's greatness seems to stem from four factors. First, he was able to provide the initial gloss on key constitutional texts and initiated many new constitutional doctrines. Second, the glosses he created were productive and fertile, creating abundant opportunities for future discussion and contestation. Third, he picked topics that were at the forefront of political concern in his era. And fourth, he was on the "right side" of most of these controversies, as judged by the political values of later generations, and, in particular, of our own day. To the extent that he was on the wrong side of other disputes, these have been conveniently forgotten. His judicial sins have, for the most part, been washed away.

This brings me to my central point. None of these factors seems to have very much to do with the sorts of criteria that law professors (and many politicians) offer as desiderata in current members of the federal judiciary. Today, one often hears calls for judges who interpret law, but do not make it; for judges who eschew judicial activism; for judges who respect the original intentions of the Framers and the values of the founding generation; for judges who are strict constructionists; for judges who are judicial

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40. Richard Posner makes a similar point in his study of Cardozo. POSNER, *supra* note 12, at 60-61, 143.

minimalists; for judges who write principled decisions; for judges who respect precedent; for judges who exercise prudence and the passive virtues; and for judges who defer to majorities and stay out of political controversies. All of these are probably valuable features of judicial practice. My point, however, is that none of them mesh with the reasons why we regard Justices of the Supreme Court as having been great or honorable in the long run.

Let us return to Roger Taney for a moment. Taney's argument in *Dred Scott* that blacks could not be citizens is a veritable paean to original intention and strict construction. But that cuts no ice today, because it was for a horrible cause. Felix Frankfurter was an advocate of judicial restraint like few have seen. But his star has been in eclipse because he took the wrong position on many of the key civil rights issues of his day. To be sure, Frankfurter was a hero to many scholars who supported judicial restraint during the 1950s, but his support of the New Deal and *Brown v. Board of Education*<sup>41</sup> are probably the strongest reasons for his continued status as a great Justice today.

Indeed, Frankfurter's elevated status may stem, in part, from the abundant good work that he did *before* he became a Justice, as a dogged defender of civil rights and civil liberties. In that case he would be more like Thurgood Marshall, who is the greatest American lawyer of the twentieth century. Marshall's Supreme Court career was distinguished enough, but even if he had never been a Supreme Court Justice, he would still be honored today for his work in fighting racial apartheid in the United States. Marshall's pre-Court work graces and elevates his work as a Justice, and the same may also be true of Frankfurter. In any case, Frankfurter's star may yet again shine more brightly, but if it does, it will be because many liberal constitutional scholars see analogies between the current Supreme Court and the conservative Court of the 1920s and 1930s. A little judicial restraint looks awfully good to them right about now.

With Frankfurter, compare William Brennan. Brennan violated almost every principle of sound judicial decision making. He didn't care much for original intention, he was alternatively activist and

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41. 347 U.S. 483 (1954).

restrained when it suited him, he never saw a statute he didn't like to rewrite, and the only precedents he truly respected were those he agreed with. Yet, there is no doubt in my mind that William Brennan is one of the greatest Justices of the twentieth century, and possibly of all time. That is because he was on the right side of most of the political battles of his era. He fought for civil rights and racial equality during an era when many more moderate and hence "sensible" people thought they could be compromised or done without. My judgment about Brennan's greatness is clearly colored by my own politics, but that is precisely my point. It is politics, and especially the politics of later generations, that tells us whether a Justice did his or her job superbly, merely adequately, or terribly, and whether the Justice will be remembered for good, remembered for bad, or simply forgotten as an irrelevancy or mediocrity.

It is no accident, I think, that there is currently a very well-funded lecture series named after William Brennan,<sup>42</sup> but not a comparable series named after Felix Frankfurter. In time there may be one, but the reason will not have to do with whether one or the other of them construed statutes better. It will be because of the political significance of Frankfurter's work to a future generation.

I have been arguing that Marshall's greatness—and indeed the greatness of all Supreme Court Justices—is a function of political usefulness to later generations, not whether they conformed to currently fashionable theories of good legal craft and judicial prudence. Nobody, I argue, gets put in the Hall of Judicial Fame because "he was always very deferential to majorities," or "she always wrote the narrowest opinion possible," or even, "he always looked to the intentions of the founding generation." Rather, if an originalist or textualist is regarded as a great Justice it will be because of the political valence of originalism or textualism in his or her own time. Hugo Black is a case in point. It is Black's support for civil liberties during the cold war, and not his theories about the centrality of the constitutional text, that make him a great Justice. It is Black's opinion in *Korematsu v. United States*,<sup>43</sup> and not his

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42. The lecture series is sponsored by the Brennan Center for Justice at the NYU School of Law. See <http://www.brennancenter.org/> (last visited Mar. 14, 2002).

43. 323 U.S. 214 (1944).

lack of judicial craft, that has done the most to diminish his reputation.

These conclusions should not be surprising. The Supreme Court is a political institution that must do its work through the forms and practices of legal decision making. In the long run, those forms and practices, which necessarily and appropriately constrain Justices in their own day, fall away from public concern. What is left standing is the quality of the political principles these Justices defended and the quality of the politics they created and preserved.

What does this mean for the current Supreme Court? Simply this: Judging by the criteria I have outlined in this essay, the current Chief Justice, William H. Rehnquist, has most of the indicia for future greatness. He has thrust himself into most of the important constitutional controversies of his generation. He has written opinions that produced considerable subsequent discussion and litigation. And he has longevity: Rehnquist languished as a dissenter on the Burger Court for many years, only to see many of his dissenting positions eventually taken up by a majority of the Court.

Whether William Rehnquist will eventually be regarded as a great Justice (and Chief Justice) will, in the long run, rest on whether he has been on the right side of the most important questions he fought over as judged by future generations. Rehnquist opposed the creation of sex-equality doctrine in the 1970s and the protection of gay rights in the 1980s and 1990s; he opposed affirmative action and the expansion of civil rights litigation. He sought to contract the rights of the accused and the rights of habeas petitioners. He sought to increase state sovereignty at the expense of federal regulatory power. And, of course, he joined in that great exercise of judicial restraint, *Bush v. Gore*.<sup>44</sup> If, in the long run, many or most of these political positions become admired, Rehnquist will be regarded as a great Justice, perhaps even one of the greatest. On the other hand, if the positions that he staked out and defended eventually are regarded as reactionary or unjust from the standpoint of the future, Rehnquist will be regarded like Justice Peckham, who wrote *Lochner v. New York*, or Justice Brown, who

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44. 531 U.S. 98 (2000).

wrote *Plessy v. Ferguson*, or perhaps like Chief Justice Taney, whose importance cannot be denied but who had the misfortune to support slavery and was the author of *Dred Scott v. Sanford*.

Many of the same points apply to Rehnquist's conservative ally on the Court, Justice Antonin Scalia. Scalia's lively style and his very opinionated opinions suggest that he, too, is a potential candidate for greatness. Like Rehnquist, he has a coterie of devoted conservative admirers who can praise his achievements and can downplay his failings. If the politics of the future agree with a sizeable segment of Scalia's views, his judicial sins will be washed away and he will take his place in the pantheon of Supreme Court greatness. Only time will tell whose politics eventually triumph.

If, as I have argued, greatness is a matter of the politics that a Justice espouses, rather than fidelity to original intention, strict construction, judicial restraint, or careful parsing of previous precedents, does this suggest that Justices should cast aside all concerns about judicial craft and simply try to be great? This is, I am afraid, a fool's errand. No one can be sure exactly what the politics of the future will look like, so it is hardly a wise idea to try to curry favor with it. That is an important reason why most politicians and lawyers look to factors that are orthogonal to greatness in judging the Justices of their own era. Not every Justice will be considered great by future generations, and indeed, we can be quite sure that most will not. Hence, it is better for a Justice to try to do his or her job scrupulously and professionally. Craft and judiciousness matters greatly in the present, because the future belongs to the future.

#### CONCLUSION: CONSTITUTIONAL PROPHECY

Nevertheless, I do have one piece of advice for members of the judiciary. It is not, I am sorry to say, a recipe for greatness. It is rather a suggestion about how one might be deserving of the esteem of the future, even if that esteem is not ultimately given. It is simply this: Don't be afraid to have a vision of the country and what it means. Your vision may not match the views of future generations, it is true, but if you do not have a vision of what America is and what its future and its destiny should be, there is

little chance that the future will think your work truly great. If you do not see great things, great things will not be seen in you. Many Justices have had views about the judicial role. Many have had strongly held views about the political issues of their own day. But to be great, one must be able to see beyond the struggles of the present and imagine the country, its meaning, and its future. One must take a stand about what America is and is to become.

I often wonder about Roger Taney from this perspective. He probably had a Jacksonian vision of an America populated by free, equal white men, supported by their own industry and labor, with special privileges for none. It is also clear from *Dred Scott* that he believed that America could not and should not ever become a colonial power, and that as new territories were acquired by the United States they should eventually become parts of the Union.<sup>45</sup> Yet, I wonder whether he really had a picture of the future, especially given his views on slavery. Did he think that slavery would last forever?<sup>46</sup> Did he ever imagine that it would someday clash with his anticolonial and Jacksonian sympathies? When he quoted the racist opinions of the founding generation with approval in *Dred Scott*, did he think that he was fulfilling a great vision of the country's destiny? Or was he merely cleverly trying to solve a political controversy of his own day? It is easy to understand what Taney thought America was. It is harder to know what Taney thought America would become.

In this respect, I think, Marshall is genuinely different. Of all of the memorable passages in John Marshall's work, there is one that I return to again and again when I teach my students. It occurs in his 1819 masterpiece, *McCulloch v. Maryland*. In the midst of many extremely clever—and occasionally specious—arguments about how the text of the Constitution supports his expansive view of federal power, Marshall suddenly pauses and offers a very different kind of argument for why the young national government must be given

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45. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 446 (1857).

46. Probably not. Taney seems to have believed that gradual emancipation was the best solution for blacks and that liberating them all at once would harm their interests. WALKER LEWIS, *WITHOUT FEAR OR FAVOR: A BIOGRAPHY OF CHIEF JUSTICE ROGER BROOKE TANEY* 360-62 (1965).



the widest authority. It is nothing less than an argument about the meaning of America and the future of the country:

Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the north should be transported to the south, that raised in the east, conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred, which would render these operations difficult, hazardous and expensive? Can we adopt that construction (unless the words imperiously require it), which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise, by withholding a choice of means?<sup>47</sup>

It is worth noting that in 1819 the boundaries of the United States did not in fact extend from the Atlantic to the Pacific, or from the St. Croix to the Gulf of Mexico. But in this passage Marshall engages in prophecy. Someday, he suggests, this is what the country will be: great and mighty, spanning an entire continent. Such a country needs a flexible Constitution that will allow it to fight its wars, to expand its reach, and to bring this enormous mass of land under its sway. In this passage, perhaps more than any other, John Marshall gives us a story about what America is and would become. Not everyone, I suspect, agrees with all of the implications of this story. For one thing, it involved the slaughter and displacement of many innocent Native Americans and the bullying of Spanish-speaking inhabitants of the continent. Nevertheless, fate has smiled on Marshall's vision of America as a great continental power. Future generations have accepted his vision of the Constitution as a flexible instrument of democracy that has—in the limited ways that constitutions can—helped America to achieve its present degree of prominence and success.

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47. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819). Lewis H. LaRue emphasizes the importance of this passage in his beautifully written book on narrative in constitutional law. He calls this John Marshall's "[S]tory of . . . [G]rowth." LEWIS H. LARUE, *CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY* 90 (1995).

Marshall, then, is great because he was a prophet of American nationalism. If the history of America had turned out differently, if the nation had fractured as a result of the Civil War, or if America had never risen to the status of a great power—his star might not shine so brightly today. Of course, that is always the case with prophets. Most prophets are false prophets. Their prophecies are discarded and soon forgotten. Even true prophets do not always understand the full import of what they are saying. That is largely because what they say is not true at the time, but is rather made true by later events. Prophets are the servants of the future, and prophecy is one of the uses that the future makes of the past.